

STATE OF MICHIGAN
COURT OF APPEALS

OAKLAND COUNTY PROSECUTOR,

Plaintiff-Appellee,

v

PETER BORIS VLCKO,

Defendant-Appellant.

UNPUBLISHED

August 18, 1998

No. 206765

Oakland Circuit Court

LC No. 97-550463-AP

Before: Jansen, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order of the circuit court vacating the Parole Board's grant of parole. We reverse.

Defendant was an osteopathic physician who was convicted by a jury of four counts of third-degree criminal sexual conduct (CSC) for molesting several of his female patients by digital penetration of the vagina and rectum. On March 29, 1994, defendant was sentenced to serve concurrent terms of three to fifteen years in prison. Defendant subsequently pleaded nolo contendere to five counts of third-degree CSC and three counts of fourth-degree CSC and was sentenced on August 29, 1994, to concurrent terms of three to fifteen years' imprisonment for the third-degree CSC convictions and to one to two years' imprisonment for the fourth-degree CSC convictions. On June 23, 1997, the Parole Board granted defendant parole, effective September 15, 1997, for a two-year term. The prosecutor appealed the Parole Board's decision to the circuit court. The circuit court reversed the Parole Board and vacated defendant's parole.

Defendant argues that the circuit court erroneously concluded that the Parole Board abused its discretion in granting parole.

The Parole Board's decision to grant parole is reviewed for an abuse of discretion. MCR 7.104(D)(5)(b); MCL 791.234(7); MSA 28.2304(7); *In re Parole of Johnson*, 219 Mich App 595, 597-598; 556 NW2d 899 (1995). Generally, an abuse of discretion is found where an unprejudiced person, considering the facts upon which the decisionmaker acted, would say there was no justification or excuse for the decision made. *In re Parole of Glover*, 226 Mich App 655, 660; 575 NW2d 772

(1997). Such a determination is to be made in light of the record and of the statutory requirements that limit the Parole Board's discretion. *Johnson, supra* at 598. Additionally, although the Parole Board is given discretion in parole decisions, that discretion is not unfettered. *Id.* Rather, it is limited by several statutory guidelines. *Id.* Further, the prosecutor, as the appellant, has the burden of proving that the Parole Board abused its discretion. MCR 7.104(D)(5).

MCL 791.233(1)(a); MSA 2303(1)(a) provides:

The grant of a parole shall be subject to all of the following:

(a) A prisoner shall not be given his liberty on parole until the board has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety.

Thus, in determining whether to grant parole, the Parole Board must consider the prisoner's mental and social attitude. *Oakland Co Prosecutor v Dep't of Corrections*, 222 Mich App 654, 657; 564 NW2d 922 (1997). Included amidst the data the Parole Board considers in making such a decision is a parole eligibility report that includes the results of any mental or psychiatric examinations of the prisoner that may have been performed. MCL 791.235(7)(c); MSA 28.2305(7)(c); *Oakland Co Prosecutor, supra*. Additionally, the Parole Board may order a psychological evaluation to be performed before deciding whether to grant or deny parole. MCL 791.235(9); MSA 28.2305(9); *Oakland Co Prosecutor, supra*.

Moreover, the Legislature enacted provisions to create parole guidelines intended to govern the exercise of the Parole Board's discretion as to the release of prisoners on parole. *Johnson, supra* at 598-599. The parole guidelines are an attempt to quantify the applicable factors that should be considered in a parole decision. Those factors are set forth by MCL 791.233e; MSA 28.2303(6), which provides in pertinent part:

(2) In developing the parole guidelines, the department shall consider factors including, but not limited to, the following:

(a) The offense for which the prisoner is incarcerated at the time of parole consideration.

(b) The prisoner's institutional program performance.

(c) The prisoner's institutional conduct.

(d) The prisoner's prior criminal record. As used in this subdivision, "prior criminal record" means the recorded criminal history of a prisoner, including all misdemeanor and felony convictions, probation violations, juvenile adjudications for acts that would have been crimes if committed by an adult, parole failures, and delayed sentences.

(e) Other relevant factors as determined by the department, if not otherwise prohibited by law.

(3) In developing the parole guidelines, the department may consider both of the following factors:

(a) The prisoner's statistical risk screening.

(b) The prisoner's age.

The record indicates that defendant completed one year of sex offender group therapy in prison and attended forty-four of forty-five possible sessions. Defendant completed all assignments and showed motivation and knowledge. He subsequently requested that he be enrolled in additional group therapy, but was told that he was not eligible to receive any additional therapy. Psychologist Floyd Byerly indicated in his first evaluation, completed after defendant participated in six months of group therapy, that defendant appeared to be accepting full responsibility for his molestation of an adult woman without her consent, but that he may be able to more fully elaborate on his thinking and planning. However, after defendant completed one year of therapy, Byerly's second evaluation indicated that defendant continued to accept responsibility for his actions and that he had shown great elaboration of his thinking and planning as it related to his deviant behavior. Byerly also noted that defendant contacted outpatient treatment agencies and expressed a willingness to continue in specialized outpatient sex offender treatment. Byerly recommended that defendant be mandated to successfully complete an outpatient sex offender treatment program to the satisfaction of the therapist and the court. He stated that effective intervention would require defendant to participate in weekly outpatient treatment for two years and follow-up treatment, supervision, and check points for two additional years or more if needed. Byerly concluded: "It is believed that as long as [defendant] stays motivated and stays involved in treatment, that he will be able to control his sexual deviance."

In granting parole, the Parole Board placed several conditions on defendant: he cannot use sexually stimulating materials; he is required to waive confidentiality and allow any treatment program in which he was enrolled to disclose information to the field agent; and he is required to participate in specialized sex offender treatment or any other mental health treatment program to which he would be referred. The Parole Board also determined that defendant showed remorse, accepted responsibility for what he had done, satisfactorily met therapeutic goals, developed insight into his behavior, had the necessary basic educational skills necessary to reduce risk, and did not appear to be a substance abuser. The Parole Board also noted that defendant's social history indicated that he has a stable employment history, has maintained family support, and that he had an acceptable placement plan and arrangements for work. Overall, the Parole Board believed that defendant demonstrated insight into his behavior and that the reports of his progress were positive.

The circuit court ruled that the Parole Board abused its discretion on the basis that defendant required additional therapy and that if he was paroled, there would be a lack of necessary supervision to assure his compliance with treatment. The circuit court thus concluded that there was no reasonable assurance that defendant would not become a menace to society. The record, however, indicates to the

contrary, and the circuit court may not simply substitute its judgment for that of the Parole Board. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 154; 532 NW2d 899 (1995). The parole guidelines' scoresheet completed before defendant's last parole hearing indicated that he had an average probability of parole as opposed to a high or low probability. Defendant also lost his license to practice medicine after he was convicted. Therefore, it is unlikely that he will be in a position to molest patients as he had done in the past. Moreover, as a condition of parole, defendant will be required to attend weekly therapy sessions for two years. Defendant will be supervised by the Department of Corrections to assure that he complies with the conditions of his parole. The Parole Board based its decision to grant parole on the psychologist's determination that defendant will be able to control his sexual deviance if he remains motivated and in therapy.

Although the prosecution believes that defendant should receive the additional therapy he needs while still in prison, defendant was clearly told that he was no longer eligible to participate in group sex offender therapy. Therefore, if defendant remains in prison, he will not receive the therapy that he needs. The prosecution also points out that there will be no way to assure that defendant will continue with follow-up treatment for at least two years after his parole expires. However, this factor does not render the conclusion that there was no justification or excuse for the Parole Board's decision. Accordingly, the circuit court erred in granting the prosecution's motion to vacate parole because the Parole Board's decision was not an abuse of discretion.

Reversed.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Peter D. O'Connell